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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 299

THE EARLY & DANIEL COMPANY, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Findings of Fact and Opinion by the Court of Claims (R. 2-8) are reported in 59 Ct. Cls. 932.

JURISDICTION

The judgment of the Court of Claims was rendered on November 3, 1924. (R. 8.) Application for appeal was filed January 26, 1925, and allowed on February 2, 1925. (R. 9.) The jurisdiction of this Court is based on Section 242 of the Judicial Code as it stood prior to the Act of February 13, 1925.

STATEMENT

The appellant, an Ohio corporation (R. 2), on July 31, 1917, entered into a contract with the Quartermaster Corps of the Army, whereby appellant agreed to furnish and deliver not to exceed 12,000,000 lbs. of hay 6,000,000 lbs. to be at the price of 97½¢

per cwt. and 6,000,000 lbs. to be at the price of 95¢ per cwt. The contract provided (R. 3, 4) that the appellant—

shall furnish and deliver during the period commencing August 1, 1917, and ending September 30, 1917, the following supplies for or at the military stations, in the manner and at the prices stated in this contract; deliveries to be made in such quantities, at such times, and in such bins, sheds, bunkers, or other places of storage at the military stations named as may be required by the receiving officer or agent of the Quartermaster Corps, unless the minimum quantities to be delivered are stated or different conditions as to place and time of delivery are expressly set forth in this contract, viz:

Twelve million (12,000,000) pounds of hay, * * *; subject to call of the party of the first part [the Government] in lots of not to exceed one million pounds (1,000,000 lbs.) per lot, all to be delivered within three months from date of first call.

The Government made the following calls (R. 4):

Call No. 1, for 500,000 lbs., dated August 15, 1917.

Call No. 2, for 1,050,000 lbs., dated August 20, 1917.

Call No. 3, for 2,000,000 lbs., dated Sept. 5, 1917.

Call No. 4, for 4,450,000 lbs., dated Sept. 12, 1917.

Call No. 5, for 4,000,000 lbs., dated Sept. 25, 1917.

The findings do not show what dates for delivery were designated in the calls. The hay covered by the first call was delivered immediately. (R. 4.) The hay covered by the second, third, and fourth calls was delivered after Sept. 25th. (R. 4, 5.)

The hay was sold f. o. b. Newport News, Va., but hay of suitable quality was not grown in the vicinity of Newport News, and most of that obtained for the contract was shipped from Ohio. Transportation facilities were disturbed during this period, and the time required therefor was unusually long. (R. 4.) Appellant delivered all the hay requested on calls 1, 2, 3, and 4 without any protest. Three of these calls each asked for delivery of more than 1,000,000 lbs. The appellant objected to call No. 5, because it exceeded 1,000,000 lbs., but such objection was not made until after too late to amend the call.

When call No. 5 for 4,000,000 lbs. was made on September 25, 1917, appellant advised the Government by letter that such call was not in accordance with the contract, and that appellant did not intend to fill it. This call, dated September 25, 1917, asked for the delivery of 4,000,000 lbs. of hay by September 30, 1917. It would have been impossible to deliver all of said hay by that time, but under the terms of the contract appellant had until November 15, 1917, three months from the date of the first call on August 15, 1917, to complete its deliveries of hay on this contract. Appellant's deliveries averaged $25\frac{1}{2}$ days from the date of call,

pay market value, we have an express contract, subject only to an appeal which failed, to take and pay the price fixed in the original contract.

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

HERMAN J. GALLOWAY,
Assistant Attorney General.

APRIL, 1926.

